

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARCUS GRAVES)	
Claimant)	
)	
VS.)	
)	
BAMA CONTRACTORS AND)	
JMC ENGINEERING, LLC)	
Respondents)	Docket No. 1,037,970
)	
AND)	
)	
UNINSURED AND)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the September 21, 2009 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 6, 2010.

APPEARANCES

Gary Albin, of Wichita, Kansas, appeared for the claimant. John R. Emerson, of Kansas City, Kansas appeared for uninsured respondent, Bama Contractors (BAMA). William L. Townsley, of Wichita, Kansas, appeared for respondent, JMC Engineering, LLC (JMC) and its insurance carrier Traveler's Indemnity Company (Travelers). D. Shane Bangerter, of Dodge City, Kansas, appeared for the Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed as follows:

1. This claim involves a functional impairment only, no general (work) disability is claimed;
2. Each party agrees that JMC is claimant's statutory employer and is responsible for claimant's injury under the Kansas Workers Compensation Act (Act);
3. Notice of claimant's injury is no longer in dispute; and
4. All parties agree the ALJ's decision to dismiss the Fund is no longer in dispute and should be affirmed.

ISSUES

In light of the foregoing stipulations, the most significant remaining issue in dispute in this appeal is the nature and extent of claimant's impairment. The ALJ awarded claimant a 9 percent permanent partial disability to the left lower extremity (left knee) based upon the opinions expressed by Dr. Pearce.

The claimant requests review of this decision and argues that the Award should be modified to reflect a 22.5 percent permanent partial impairment to his knee (which is an average of the impairment ratings to the knee proffered by Drs. Pearce and Murati) as well as an additional 10 percent permanent partial impairment to the whole body for claimant's antalgic gait. Claimant asserts that the ALJ's Award fails to compensate him for his severely altered gait that has developed since his accident and recognizes only the impairment to his left knee. Claimant also contends he is entitled to an additional 16 days of temporary total disability (TTD) benefits, an issue that was apparently not addressed by the ALJ.

Both respondents, Bama Contractors and JMC Engineering, LLC contend that Award should be affirmed as does the Fund.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

¹ In the Award the Fund was dismissed from this litigation by the ALJ and no one disputes this aspect of the Award.

The primary issue for purposes of this appeal is the nature and extent of claimant's impairment as a result of his November 15, 2007 accident. Two physicians testified as to claimant's condition, their objective findings and ultimate conclusions. Dr. Charles E. Pearce, an orthopaedic surgeon who specializes in shoulder and knee arthroscopy², examined claimant on August 27, 2009 at respondent's request. At the time of this examination, claimant was using a knee brace and walking with a cane. Following that examination, Dr. Pearce testified that claimant had suffered a left knee anterior cruciate ligament tear and reconstruction along with a partial meniscectomy as a result of his work-related accident. As of the date of the examination, claimant was experiencing mild pain or aching in his knee as well as some swelling and weakness but overall had experienced, in Dr. Pearce's view, a good result from his surgical treatment. These difficulties are worse with standing, walking, lifting, exercise, twisting, bending, squatting, kneeling and stair climbing.³

Dr. Pearce went on to assign an impairment as follows:

He [claimant] has sustained a 2% permanent partial impairment as it pertains to the lower extremity. This would be 1% of the person as a whole for partial meniscectomy. This is found on page 85, table 64. Additionally, because of narrowed cartilage interval, he should receive 7% of the lower extremity and 3% of the person as a whole. Combined, this would be 9% of the lower extremity and 4% of the person as a whole.⁴

When asked if claimant exhibited any sort of altered gait, Dr. Pearce responded:

With -- with walking with no brace, no cane, he had what I thought was a trace, barely noticeable is what that means, what we call antalgic gait. Light limp would be the same thing perhaps.⁵

In rather stark contrast to Dr. Pearce's testimony is that offered by Dr. Pedro Murati, a board certified physiatrist who examined claimant at claimant's counsel's request. Although Dr. Murati does not recall claimant, he nevertheless remembers claimant's knee. He testified:

... I just remember his knee. His knee is -- you remember his knee because it is one of the worst surgical outcomes I have ever seen. There's one that is worse than this one. Actually, no, I remember three. He's one of the three. I just cannot

² Pearce Depo. at 4.

³ *Id.*, Ex. 3 at 3.

⁴ *Id.*

⁵ *Id.* at 11.

possibly imagine how a supposedly competent surgeon would be happy with this result. This is -- this is just unbelievable that they are comfortable letting this guy walk around with this knee. I just can't -- I mean, I just -- I just have a hard time thinking about it.⁶

According to Dr. Murati, claimant had "severe antalgia", a "very, very bad limp".⁷ Dr. Murati testified that claimant was using a cane for ambulation, that he had some catching in the lateral compartment, which he believed was probably a meniscus tear of some kind, along with medial instability on the left.⁸

Dr. Murati assigned a total of a 36 percent to the left lower extremity, which converts to a 14 percent whole body impairment. This figure represents the impairment for flexion contracture, instability to the knee and patellofemoral syndrome. In addition, Dr. Murati assigned a 20 percent whole person for claimant's severe antalgia. According to Dr. Murati, claimant needs to use a cane in order to ambulate and his resulting antalgia warrants the additional impairment rating. There is nothing within Dr. Murati's report which suggests claimant voiced any complaints relative to his back. Indeed, the pain diagram makes no reference to back pain or difficulties.

The ALJ was more persuaded by the testimony offered by Dr. Pearce and adopted his findings and assessment with regard to claimant's permanency. She noted "Dr. Pearson's [sic] evaluation is the most persuasive since he is an orthopedic surgeon specializing in shoulder and knee arthroscopy. Further, this was the most recent evaluation of the claimant."⁹

The Board has considered the record as a whole, as well as the parties' arguments and concludes the ALJs' Award should be affirmed in all respects. Like the ALJ, the Board is more persuaded by the opinions and testimony offered by Dr. Pearce, over that offered by Dr. Murati. Simply put, it is illogical to assign any sort of permanency to the claimant's back when the claimant has not expressed any complaint to that area of the body. Accordingly, the ALJ's Award is affirmed.

As for claimant's request for an additional 16 days of TTD benefits, the Board finds that claimant has failed to establish that he was unable to work during that period of time encompassed by his request. The evidence reveals that BAMA had offered accommodated work and claimant seems to have refused that offer. And while BAMA

⁶ Murati Depo. at 7-8.

⁷ *Id.* at 9.

⁸ *Id.* at 9-10.

⁹ ALJ Award (Sept. 21, 2009) at 6.

apparently went ahead and paid claimant TTD benefits at least up until August 10, 2008, there is no indication from the file that he was unable to work from August 10 to August 26, 2008. Thus, the request for additional TTD benefits is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 21, 2009, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Gary Albin, Attorney for Claimant
John R. Emerson, Attorney for Respondent, Bama Contractors
William L. Townsley, Attorney for JMC Engineering, LLC and Traveler's
D. Shane Bangerter, Attorney for the Fund
Pamela J. Fuller, Administrative Law Judge